Bank Utama (Malaysia) Bhd v The owner [sic] of and other persons interested in the Vessel 'Pintas Samudra 1', Sri Johore Bahru Sdn Bhd & Ors

HIGH COURT (SIBU) — ADMIRALTY IN REM NO 27–3 OF 2001
CLEMENT SKINNER J
17 FEBRUARY 2003

Civil Procedure — *Writ of summons — Service — Service of writ by AR registered post — Whether plaintiff has affected service of writ on defendant*

Shipping and Navigation — *Admiralty — Hybrid writ — Whether such a writ may be issued in Malaysia*

Sri Johore Bahru Sdn Bhd ('Sri Johore Bahru') entered into a loan agreement ('the loan agreement') with a company known as Kewangan Utama Bhd ('the finance company') wherein Sri Johore Bahru was granted a loan facility of RM1.6m. As security for the loan, the finance company obtained a charge over a vessel owned by Sri Johore Bahru and a guarantee from four persons ('the guarantors') who were named as the second, third, fourth and fifth defendants. By an order granted by the High Court, all rights or liabilities of the finance company were transferred to the plaintiff. The plaintiff alleged that there was a breach of the loan agreement and Sri Johore Bahru fell into arrears in repayment of the said loan. To recover the moneys owing to it under the loan agreement, the plaintiff commenced an admiralty action in rem against the said vessel as well as Sri Johore Bahru and the guarantors. The plaintiff sought to justify its mode of action by describing the writ as a hybrid writ, in which the plaintiff's in personam claim against the defendants has been 'engrafted' onto its in rem claim against the vessel. The plaintiff caused the writ to be served on each of the first, second, third and fourth defendants by AR registered post, adopting the mode of service permitted by O 10 r 1 of the Rules of High Court 1980 ('the RHC'). When the third defendant failed to enter an appearance, the plaintiff obtained a judgment in default of appearance against him. The third defendant applied to set aside a judgment in default of appearance entered against him.

Held, allowing the application:

(1) The writ had been posted to the third defendant by AR registered post to the address given by him in the guarantee. The plaintiff produced a receipt issued by the Post Office, Sibu evidencing the same. The third defendant had not challenged at all the plaintiff's evidence of posting. There was no basis therefore for his complaint that the plaintiff had not effected service of the writ on him when on the evidence before the court, the plaintiff was clearly entitled to rely on the presumption that service of the writ had been effected on him at the time when it would have been

delivered in the ordinary course of post, which he had not been able to prove to the contrary (see pp 242B, 243G–H).

(2) The plaintiff's cause of action against the third defendant was founded on his alleged breach of obligations under the guarantee to pay all sums due under the loan agreement. A comprehensive list of all the claims and questions which a court may determine in the exercise of its Admiralty jurisdiction is fully set out in s 20(2) of the Supreme Court Act 1981, and on going through them as well as ss 21, 22, 23 and 24 of the same Act a claim on a guarantee such as in this case sued upon was definitely not one of them. Section 21(1) of the Supreme Court Act 1981 itself afforded, by its language, a clear indication that such a claim in personam as was now brought against the third defendant may not be brought in the Admiralty Court as it does not come 'within' the Admiralty jurisdiction of the court. The subject matter of the plaintiff's claim against the third defendant, not being a claim in personam within the Admiralty jurisdiction of the court, was wrongly commenced against him in the Admiralty Court, whether by way of 'engraftment' onto an action in rem or otherwise. The judgment which the plaintiff obtained against him was fundamentally flawed and it must be set aside (see pp 245G–I, 246B–E).

[Bahasa Malaysia summary

Sri Johore Bahru Sdn Bhd ('Sri Johore Bahru') telah memasuki satu perjanjian pinjaman ('perjanjian pinjaman') dengan sebuah syarikat yang dikenali sebagai Kewangan Utama Bhd ('syarikat kewangan') di mana Sri Johore Bahru telah diberi kemudahan kewangan RM1.6j. Sebagai jaminan untuk pinjaman itu, syarikat kewangan telah mendapatkan satu gadaian di atas kapal Sri Johore Bahru dan jaminan daripada empat orang ('penjamin-penjamin') yang dinamakan defendan-defendan kedua, ketiga, keempat dan kelima. Melalui satu perintah oleh Mahkamah Tinggi, semua hak-hak atau liabiliti-liabiliti syarikat kewangan dipindahkan kepada plaintif. Plaintif mengatakan bahawa terdapat kemungkiran perjanjian pinjaman dan Sri Johore Bahru telah tertunggak dalam pembayaran balik pinjaman itu. Untuk mendapat kembali wang di bawah perjanjian pinjaman itu, plaintif telah memulakan satu tindakan admiraliti in rem terhadap kapal itu dan Sri Johore Bahru dan penjamin-penjamin. Plaintif cuba menjustifikasikan cara tindakan beliau dengan menyatakan bahawa writ itu adalah writ hibrid, di mana tuntutan in personam plaintif terhadap defendan-defendan telah 'engrafted' pada tuntutan in rem terhadap kapal itu. Plaintif telah menyampaikan writ itu ke atas defendan-defendan pertama, kedua, ketiga dan keempat dengan pos AR berdaftar, memakai cara penyampaian yang dibenarkan oleh A 10 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Apabila defendan ketiga gagal memasukkan kehadiran, plaintif telah mendapat penghakiman ingkar kehadiran terhadapnya. Defendan ketiga memohon untuk mengenepikan penghakiman ingkar kehadiran yang dimasukkan terhadapnya.

Held, membenarkan permohonan:

(1) Writ telah diposkan kepada defendan ketiga oleh pos AR berdaftar kepada alamat yang diberi olehnya di dalam jaminan. Plaintif telah mengemukakan resit yang dikeluarkan oleh Pejabat Pos, Sibu yang menunjukkan yang sama. Defendan ketiga tidak mencabar langsung keterangan pos plaintif. Tiada asas untuk aduan bahawa plaintif tidak menyampaikan writ ke atasnya di mana pada keterangan di mahkamah, plaintif jelas berhak bergantung kepada anggapan bahawa writ itu telah disampaikan ke atas beliau pada masa apabila ia mungkin diposkan kepada beliau menggunakan pos biasa, yang mana beliau tidak dapat membuktikan sebaliknya (lihat ms 242B, 243G–H).

(2) Kausa tindakan plaintif terhadap defendan ketiga berasaskan kemungkiran obligasinya yang dikatakan di bawah jaminan untuk membayar semua wang yang perlu dibayar di bawah perjanjian pinjaman. Satu senarai komprehensif tuntutan dan soalan yang mungkin diputuskan oleh mahkamah di dalam menggunakan bidang kuasa Admiralitinya dinyatakan dengan penuh di dalam s 20(2) Akta Mahkamah Agung 1981, dan dengan menelitinya, dengan ss 21, 22, 23 dan 24 Akta yang sama satu tuntutan pada satu jaminan seperti di dalam kes ini tidak termasuk di dalamnya. Seksyen 21(1) Akta Mahkamah Agung 1981 jelas menunjukkan, melalui bahasanya, bahawa tuntutan in personam terhadap defendan ketiga tidak boleh dibawa di hadapan Mahkamah Admiraliti kerana ia tidak termasuk bidang kuasa Admiraliti mahkamah. Perkara subjek tuntutan plaintif terhadap defendan ketiga, bukan merupakan tuntutan in personam di dalam bidang kuasa Admiraliti mahkamah itu, dimulakan terhadapnya dengan salah di dalam Mahkamah Admiraliti, sama ada melalui 'engraftment' pada tindakan in rem atau sebaliknya. Penghakiman yang plaintif dapat terhadapnya adalah cacat dan mesti diketepikan (lihat ms 245G–I, 246B–E).]

Notes

For cases on service of writ of summons, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 6618–6627.

For cases on admiralty, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue), paras 972–1012.

Cases referred to

Federal Flour Mills Ltd v Owners of the Vessel 'Ta Tung' & Anor [1970] 2 MLJ 147 (refd)

'Nagasaki Spirit, The'; Owners of Cargo Laden or Lately Laden on board the Ship or Vessel 'Ocean Blessing' v Owners of the Ship or Vessel 'Nagasaki Spirit' & Anor (No 2) [1994] 1 SLR 445 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 24(b)
Interpretation Acts 1948 and 1967 s 12
Rules of the High Court 1980 O 2, O 10 r 1(1), O 13, O 16, r 11, O 42 r 13, O 70, r 20(3), (4), (7), (10)
Supreme Court Act 1981 [UK] ss 20, 21, 22, 23, 24
Merchant Shipping Act 1995 [UK]
Rules of the Supreme Court 1970 [Sing]

Ting Soon Pang (*SK Ling & Co*) for the plaintiff.
David Chong (*Tang & Co*) for the defendants.

Clement Skinner J: This is the hearing of an application by the third defendant to set aside a judgment in default of appearance entered against him in this action.

The grounds upon which he seeks to do so are that:

(1) there was no proper service on him of the writ in this action;

(2) the admiralty jurisdiction of the court was wrongly invoked as the plaintiff's claim against him did not come within the admiralty in rem or in personam jurisdiction of the court;

(3) the judgment in default of appearance was obtained improperly and irregularly, in that it purports to be based on an action over which the Admiralty Court does not exercise jurisdiction;

(4) in the alternative, if the admiralty jurisdiction of the court was properly invoked, the judgment was obtained irregularly as the plaintiff has failed to comply with O 70 r 20(3), (4) and (7) of the Rules of the High Court 1980 ('the RHC'), in that the plaintiff did not apply for judgment by motion in accordance with the abovementioned rules.

The facts leading up to the third defendant's application are these.

On 6 January 1998, a company called Sri Johore Bahru Sdn Bhd ('Sri Johore Bahru') entered into a loan agreement ('the loan agreement') with a company known as Kewangan Utama Bhd ('the finance company') wherein Sri Johore Bahru was granted a loan facility of RM1.6m, on the terms and condition stated therein.

As security for the loan, the finance company obtained:

(1) a charge over a vessel named '*Pintas Samudra 1*' ('the said vessel') which is or was owned by Sri Johore Bahru; the charge being taken in the form of a deed of covenants accompanying statutory mortgage dated 6 January 1998 ('the deed of covenants'); and

(2) a guarantee dated 6 January 1998 ('the guarantee') from four persons who were named as the second, third, fourth and fifth defendants in this action.

The plaintiff has since discontinued the action against the fourth guarantor, so I will not refer to him hereafter.

By an order granted by the High Court at Kuala Lumpur (the date of which has not been disclosed to the court), all rights or liabilities of the finance company were transferred to the plaintiff for the plaintiff to have the same rights, powers and remedies (and in particular the same rights and powers as to taking or resisting legal proceedings or making or resisting applications to any authority) as the finance company did.

The plaintiff alleges that in breach of the loan agreement, Sri Johore Bahru fell into arrears in repayment of the said loan and that despite demands from the finance company that they should do so, Sri Johore as well as the second, third and fourth defendants have failed or refused to pay the amount owing under the loan agreement and guarantee respectively.

To recover the moneys owing to it under the loan agreement, the plaintiff commenced an Admiralty action in rem against the said vessel as well as Sri Johore Bahru and the guarantors. In view of the issues raised by the third defendant in this application, it will be necessary to say something about the mode of action selected by the plaintiff in commencing this action, the parties it has cited as defendants and the cause of action pleaded against them.

On 15 October 2001 the plaintiff caused to be issued out of the registry of this court a writ of summons which is intituled 'Admiralty Action in Rem against the ship '*Pintas Samudra 1*' official No 328281 Registered No 3 of 1998'.

However, when it came to naming the parties to the action, it was said to be an action between the following parties:

BETWEEN

BANK UTAMA (MALAYSIA) BHD	Plaintiff

AND

THE OWNER [SIC] OF AND OTHER PERSONS interested in the Vessel 'Pintas Samudra 1'	
SRI JOHORE BAHRU SDN BHD	First Defendant
YANG CHOO KUI	Second Defendant
LING TIONG KIONG	Third Defendant
CHUNG KOK CHIONG	Fourth Defendant

The writ was endorsed with the plaintiff's claim against the first, second, third and fourth defendants and was for:

> Moneys outstanding pursuant to a Loan Agreement dated 6 January 1998 entered between the Plaintiff and the First Defendant, which was supplemented by the following documents:
>
> (i) A guarantee signed by the Second, Third, Fourth and Fifth Defendants dated 6 January 1998;
>
> (ii) A Statutory Mortgage over 'Pintas Samudra 1' granted by the First Defendant in favour of the Plaintiff registered at the Port Klang Shipping Registry Office dated 6 January 1998; and
>
> (iii) A Deed of Covenants Accompanying Statutory Mortgage dated 6 January 1998 in respect of 'Pintas Samudra 1' signed by the First Defendant'.

The writ of summons was also endorsed with a statement of claim containing 18 paragraphs in all. Paragraphs 1 to 3 thereof discloses how the right to bring this action became vested in the plaintiff. Paragraphs 4 to 10 describes the loan granted to 'the first defendant' and sets out the essential terms of the loan agreement, such as, for example, the number of instalments by which it was repayable, the rates of interest (including default interest) and how a demand for repayment may be made. Paragraphs 11 and 12 of the statement of claim concerns the guarantee executed by the second, third, and fourth defendants and pleads that the guarantee was to secure all sums due to the plaintiff by the 'first defendant' under the loan agreement. Paragraphs 14 to 18 of the statement of claim contain general averments regarding the refusal of the defendants to pay the sums outstanding under the loan agreement which stood at RM529,190.03 as at 4 September 2001, despite repeated demands that they should do so.

I pause here to mention that although the plaintiff has brought an Admiralty action in rem against the vessel '*Pintas Samudra 1*', and although it is stated in para 5 that the 'first defendant' had executed a charge over the said vessel by way of security for the loan and that the plaintiff 'shall rely on the terms and conditions of the said deed of covenants at any stage of the proceedings and trial', the facts pleaded in its statement of claim show that it is only suing under the loan agreement to recover moneys due to it which was borrowed by Sri Johore Bahru; the plaintiff does not sue to recover under the terms of the deed of covenant, ie the charge over the vessel. It is also evident from a reading of its pleadings that apart from a passing reference to the security it took over the said vessel, the plaintiff does not bring this Admiralty action in rem to enforce any of its rights under the mortgage or charge.

I should also say that while in name the action is supposed to be an action in rem against the vessel '*Pintas Samudra 1*', when one considers the cause of action that is pleaded against the defendants named in the action, it is immediately evident that no facts have been pleaded which would entitle the plaintiff to maintain a claim against the vessel. Instead, what is pleaded is a cause of action against Sri Johore Bahru as the first defendant for the money it has borrowed under the loan agreement, and against the second, third and fourth defendants as guarantors for the sums due under the loan agreement. I would accordingly describe the plaintiff's claim against the defendants as a claim in personam — but a claim in personam which the third defendant contends does not fall within the admiralty jurisdiction of the court as the subject matter of the plaintiff's claim against him does not fall within the admiralty jurisdiction of the court. This contention will be addressed shortly.

Counsel for the plaintiff sought to justify its mode of action by describing the writ as a hybrid writ, in which the plaintiff's in personam claim against the defendants has been 'engrafted' onto its in rem claim against the vessel. According to counsel for the plaintiff, the court has an unfettered discretion to allow the plaintiff's claim to be brought in this manner. More will be said on this matter shortly.

Returning to the background facts, the plaintiff has not served the in rem writ on the vessel as I understand she remains out of the jurisdiction.

The court file indicates that a warrant of arrest has been issued against the vessel but never executed. A

The plaintiff caused the writ to be served on each of the first, second, third and fourth defendants by AR registered post, adopting the mode of service permitted by O 10 r 1 of the RHC. In respect of the third defendant, the writ was posted to the address he gave in the guarantee, namely, No 21, Jalan Tun Abang Haji Openg, 96000 Sibu ('the Sibu address'). The writ was posted to him on 20 October 2001 and as proof of posting, the plaintiff has, in an affidavit affirmed on its behalf by one Rudy bin Bolhan on 5 November 2001, exhibited the postal receipt issued by the Post Office, Sibu in respect thereof. The plaintiff also exhibited an AR card which shows that the article posted to the third defendant was duly acknowledged as having been received on 22 October 2001. B C

When the third defendant failed to enter an appearance within the time allowed to do so, the plaintiff adopted the procedure set out in O 13 of the RHC to obtain a judgment in default of appearance against him. The court file indicates that the plaintiff has also entered judgment in default of appearance against the first, second and fourth defendants. D

Thereafter, the plaintiff sent the judgment to the third defendant by AR registered post on 24 November 2001, addressed to him at the Sibu address. As proof of such posting, the plaintiff has, in the affidavit of one Thomas Chiew Bang Sing affirmed on 22 October 2002, exhibited a copy of the receipt issued by the Post Office, Sibu in respect of such posting, and an AR card showing the article posted had been received on 29 November 2001. E

Some ten months after obtaining judgment against the third defendant, the plaintiff realized that there was a typographical error appearing in the writ as well as the judgment in that the word 'Samudra' in the vessel's name was wrongly spelt as 'Samutra', so it took steps to correct the error by filing an application to amend the same. The plaintiff caused a copy of its application to be served on the third defendant who then filed this application seeking to set aside the judgment in default on the grounds abovementioned. F

I now consider each of the grounds. G

Was service irregular?

In dealing with this ground, I wish to make it clear that the point was argued before me purely on the basis of what constitutes good and proper service of legal process. To decide the issue at hand it will therefore be necessary to assume for the sake of argument only but without deciding the point now, that it is permissible to issue a hybrid writ and that the writ in this action also functions as an admiralty writ in personam against the third defendant. H

The third defendant complains that the judgment should be set aside because he never received a copy of the writ nor has he been served with a copy of the judgment in default. He denies signing any acknowledgment of service, and denies that the Sibu address is his address and says that to the best of his knowledge, that is the second defendant's address. He claims to I

A have moved to Kuching in 1992 and that the plaintiff's officer, Mr Thomas Chiew Bang Sing knew of his full address and telephone numbers in Kuching. He also alleges that there was no attempt to serve the writ on him personally in Kuching nor was he informed of the writ by the plaintiff or its servants until sometime on 24 September 2002.

B I regret that I find no substance in these complaints. It is apparent to me from what he asserts that the third defendant considers service of process to be properly effected only when he personally receives the writ or personally acknowledges having received it. Such a view overlooks two essential features of service of process under the RHC: first, that as far as service of a writ on a person is concerned, O 10 r 1(1) of the RHC permits C a writ to 'be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address'; and secondly, that there is a fundamental distinction between personal service on the one hand and service by post in accordance with the rules of court, on the other. In the case of the former, actual physical delivery is necessary whereas in the case of the latter, once it is proved that the writ has been posted to the D defendant in the manner stipulated in O 10 r 1(1), resort may be had to the provisions of s 12 of the Interpretation Acts 1948 and 1967 to presume that service has been effected in the ordinary course of post.

Section 12 of the Interpretation Acts 1948 and 1967 states:

> Where a written law authorises or requires a document to be served by post, E then, until the contrary is proved, service:
>
> (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
>
> (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

F As to the question whether the RHC comes within the definition of 'written law' referred to in s 12 of the Interpretation Act, I had occasion to consider a similar question in *MBF Finance Bhd v Tiong Kieng Seng* [2001] 4 CLJ 38 when I answered the question in the affirmative. Although in that case the question arose in the context of the Subordinate Courts Rules, for the reasons I gave there, the position would be no different in the case of the G Rules of the High Court.

Reverting to the facts of this case, in order to prove that the writ had been posted to the third defendant by AR registered post to the address given by him in the guarantee ie to the Sibu address, the plaintiff produced a receipt issued by the Post Office, Sibu evidencing the same. The third defendant has H not challenged at all the plaintiff's evidence of posting. There is no basis therefore for his complaint that the plaintiff has not effected service of the writ on him when on the evidence before the court, the plaintiff was clearly entitled to rely on the presumption that service of the writ had been effected on him at the time when it would have been delivered in the ordinary course of post, which he has not been able to prove to the contrary.

I With reference to the third defendant's assertion that the Sibu address is not his as he had moved to stay in Kuching since 1992 and that his address there was known to the plaintiff's branch manager, I find these

assertions of no help to the third defendant for the following reasons. In the first place, as it was the third defendant himself who gave No 21, Jalan Tun Abang Haji Openg, Sibu as his address in the document of guarantee, it does not lie in his mouth to now deny that that is his address. In the second place, although he says he moved to Kuching in 1992, there is no evidence when or at what point in time the plaintiff's branch manager came to know of his address there. A B

For all the above reasons, I reject the third defendant's contention that he had not been properly served with the writ in this action.

Was the admiralty jurisdiction of the court wrongly invoked and did the admiralty Court have jurisdiction over the plaintiff's cause of action against the third defendant? C

I will deal with the next two grounds together as the issues raised by them overlap to a large extent.

It is the third defendant's complaint that the admiralty jurisdiction of the court was wrongly invoked as the subject matter of the plaintiff's cause of action against him did not come within the admiralty jurisdiction of the court. Consequently, any judgment in default of appearance obtained against him was irregular and should be set aside. D

The plaintiff's case, on the other hand, is that it properly invoked the admiralty jurisdiction of this court because it had, by the issue of the writ in this action, commenced an admiralty action in rem as well as an action in personam, in which it had engrafted its claim in personam against the third defendant, onto its claim in rem against the vessel. Counsel for the plaintiff described it as a hybrid writ, and according to counsel for the plaintiff, the court has an unfettered discretion to allow the plaintiff to bring such an action provided no injustice or inconvenience is caused. In support of his contention, counsel cited the case of *Federal Flour Mills Ltd v Owners of the Vessel 'Ta Tung' & Anor* [1970] 2 MLJ 147. E F

From what is said by counsel for the plaintiff, it is apparent to me that the plaintiff has proceeded to file this admiralty action against the third defendant on the basis of two assumptions it has made, namely: (a) that the subject matter of its claim in personam against the third defendant falls within the admiralty jurisdiction of the court and is enforceable by the issue of an in personam writ against him; and (b) it is permissible to issue a hybrid writ. The question is, is the plaintiff correct in the assumptions it has made? Or put in another way, is the subject matter of the plaintiff's claim against the third defendant one that is enforceable within the admiralty jurisdiction of the court; and if so, can it be enforced by the issuance of a hybrid writ? G H

To resolve the issue at hand, it will be necessary to first examine two related matters: (a) what the admiralty jurisdiction of this court is; and (b) the mode by which that jurisdiction is exercised. With regard to the admiralty jurisdiction of this court, reference must be made to s 24(b) of the Courts of Judicature Act 1964 which provides that the civil jurisdiction of the High Court shall include the same jurisdiction and authority in relation I

A to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.

The admiralty jurisdiction of the High Court in England, is set out in ss 20-24 of the Supreme Court Act 1981. Section 20(1) states:

> The Admiralty jurisdiction of the High Court shall be as follows, that is to say:
>
> B (a) jurisdiction to hear and determine any of the questions and claims mentioned in sub-section(2);
>
> (b) jurisdiction in relation to any of the proceedings mentioned in sub-section (3);
>
> (c) ...
>
> C (d) ...

Section 20(2)(a)-(s) then sets out a comprehensive list of all the questions and claims which may be heard and determined by the High Court in the exercise of its admiralty jurisdiction. The proceedings mentioned in s 20(3) over which the Admiralty Court will exercise jurisdiction consists of D applications made under the Merchant Shipping Act 1995, and any action to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships and limitation actions. Section 22 deals with certain restrictions placed on the High Court in entertaining actions in personam which are commenced in collision and other similar claims. Section 23 prohibits the High Court having jurisdiction in cases which fall within the E Rhine Navigation Convention, while s 24 defines certain words and phrases used in ss 20–23.

With regard to the mode by which the admiralty jurisdiction of the court is exercised, that is set out in s 21 of the Supreme Court Act 1981 and a reading of the section shows that where a claim falls within the admiralty F jurisdiction of the court the mode of exercise of the jurisdiction is by either bringing an action in rem, ie by proceeding against the 'res' or specific property; or by an action in personam, ie by proceeding against a specific person or body corporate.

So, does the subject matter of the plaintiff's claim against the third defendant fall within the admiralty jurisdiction of the court?

G

In my considered view, it does not and I say so for the following reasons. In the first place I have already said, when introducing the facts, that the plaintiff's cause of action against the third defendant is founded on his alleged breach of obligations under the guarantee to pay all sums due under the loan agreement. A comprehensive list of all the claims and H questions which a court may determine in the exercise of its admiralty jurisdiction is fully set out in s 20(2) of the Supreme Court Act 1981, and on going through them as well as ss 21, 22, 23 and 24 of the same Act a claim on a guarantee such as now sued upon is definitely not one of them. In the second place, it is my view that s 21(1) of the Supreme Court Act 1981 itself affords, by its language, a clear indication that such a claim in I personam as is now brought against the third defendant may not be brought in the Admiralty Court as it does not come 'within' the Admiralty jurisdiction of the court. Section 21(1) states that:

> Subject to section 22, *an action in personam* may be brought in the High Court in all cases within the Admiralty jurisdiction of the Court. (Emphasis added.)

I interpret the words I have printed in italics to mean that subject to what is stated in s 22, which for present purposes are not relevant, it is only in respect of those questions and claims which come within the admiralty jurisdiction of the court that an action in personam may be brought in the Admiralty Court. Otherwise, an Admiralty Court will have no jurisdiction over the matter and a plaintiff wishing to make such a claim is obliged to do so by issuing an ordinary writ action in the courts.

In my judgment the subject matter of the plaintiff's claim against the third defendant, not being a claim in personam within the admiralty jurisdiction of the court, it was wrongly commenced against him in the Admiralty Court, whether by way of 'engraftment' onto an action in rem or otherwise.

It must follow from what I have just said that as the plaintiff's cause of action against the third defendant was of a matter not within the admiralty jurisdiction of the court, the judgment which the plaintiff obtained against him was fundamentally flawed and one to which the provisions of O 2 of the RHC would not apply as we are here not dealing with a judgment that has been entered as a result of 'a failure to comply with the requirements of these rules', but with a judgment that has been obtained in proceedings over which the Admiralty Court does not exercise jurisdiction. It must be set aside.

But counsel for the plaintiff says that the default judgment should not be set aside as the third defendant delayed for more than 30 days in coming to court to do so, and drew my attention to O 42 r 13 of the RHC. I do not see any merit in this argument. In an appropriate case the court will overlook delay where no prejudice results to a plaintiff (see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 42). This is such a case. What prejudice can the plaintiff complain of where it has improperly commenced an admiralty action in personam against the third defendant and thereafter obtained a judgment in default in respect of a cause of action which is not within the admiralty jurisdiction of the court?

On the issue of the propriety of issuing a hybrid writ in rem and in personam within the admiralty jurisdiction of a Malaysian High Court, before I consider the position in Malaysia it will be useful to look at the practice in England as well as in Singapore.

In England, while the practice of issuing a hybrid writ was formally allowed, it has since 2 April 1979 been disallowed. Now, if it is desired to commence proceedings both in rem as well as in personam, separate writs must be issued. See Practice Direction dated 6 March 1979 in 2 All ER 155.

The present practice in Singapore also appears to be that a hybrid in rem and in personam writ may not be issued within the admiralty jurisdiction of the High Court. In *'The Nagasaki Spirit'; Owners of Cargo Laden or Lately Laden on board the Ship or Vessel 'Ocean Blessing' v Owners of the Ship or Vessel 'Nagasaki Spirit' & Anor (No 2)* [1994] 1 SLR 445, it was

pointed out there by GP Selvam JC that apart from the fact that such writs were not provided for in the then Singapore Rules of the Supreme Court 1970, a hybrid writ will lead to undesirable and embarrassing complications, such as the proper naming of parties and the appropriate procedures to follow on a default of proceedings. In my view the observations made in '*The Nagasaki Spirit*' regarding the complications and embarrassment that could arise from the issuance of a hybrid writ have manifested themselves in this case. Take the service point for example. As I have already said, even though the writ here is an in rem writ against the vessel, the named defendants are individuals or a company. The embarrassment which has arisen as a result of the plaintiff having engrafted its in personam claim against individuals onto an in rem writ against a vessel is that whereas service of an in rem writ is usually effected by serving it on the res or property proceeded against, in this case it has been served on a person and not on the 'res'. It is for this reason that it was necessary to say when considering the question of service of process, that for the sake of argument only I was proceeding on the basis that the writ that had been issued in this action was capable of functioning as an in personam writ, when it clearly was not issued as one. Similarly, because the plaintiff issued a hybrid writ, unnecessary questions have been raised as to the proper procedure to be followed where the third defendant failed to enter an appearance to the action, namely, whether the procedures mentioned in O 70 of the RHC only are available to the plaintiff or the default provisions found in O 13 of the RHC would apply. These questions will be addressed shortly.

I am fully aware that in this case the third defendant has not applied to set aside the so called hybrid writ, but this should not prevent me from saying that the RHC does not provide for such a hybrid writ and in my opinion, for the reasons discussed above should not be allowed within the admiralty jurisdiction of the High Court.

This brings me to the case of *Federal Flour Mills Ltd.* A reading of the decision in that case shows that the action started off as an action in rem, whereby the plaintiffs as owners of a cargo of wheat shipped on board the vessel 'Ta Tung' brought an action in rem against the vessel, the owners and all persons interested in her, for damage sustained by reason of the cargo becoming contaminated by fuel oil. The owners of the vessel appeared and by way of defence alleged negligence on the part of a third party, namely, the stevedores for contamination of the cargo. So the plaintiff applied, under O 16 r 11 of the RHC to join the stevedores as defendants on the ground of convenience. It was in those circumstances that Raja Azlan Shah J, (as His Highness then was) said that the court has an unfettered discretion to allow a claim in personam to be engrafted upon a claim in rem provided no injustice or inconvenience is caused. Now, it should be noted that the action in that suit started off as an action in rem pure and simple, and not as a 'hybrid' action at inception as here, which has led to confusion and embarrassment regarding the question of service and default procedures after service. It should also be noted that what was said there about the court's unfettered discretion, was said in the context of an application under

O 16 relating to joinder of parties, and, after reference to several English cases which were decided at a time when the practice of issuing a hybrid writ in England was allowed. With all respect, I do not think, therefore, that that case can still be held up as authority for the proposition that a hybrid action in rem and in personam may be commenced in one action.

I must finally deal with the third defendant's attack on the procedure adopted by the plaintiff in obtaining the judgment in default of appearance against him. It is his contention that the judgment is irregular and void as the plaintiff failed to comply with the specific procedures set out in O 70 r 20(3), (4) and (7) of the RHC which in essence states that in an admiralty action in rem, where a defendant fails to enter an appearance within the time limited for doing so, then a plaintiff may:

(a) apply to the court for judgment in default;

(b) verify the facts on which the action is based by affidavit, including the fact of service;

(c) move the court for such judgment by way of a motion.

According to the third defendant, none of the above steps were taken by the plaintiff who had instead adopted the procedure stated in O 13 of the RHC which, counsel for the third defendant was quick to point out, is expressly stated in O 70 r 20(10) to be inapplicable to actions in rem.

In my judgment, a careful reading of the provisions of O 70 r 20 shows that as a matter of interpretation, the procedures referred to in the rule only relate to entering a judgment in default against a defendant in an admiralty action in rem as the words 'in rem' appear in each of the relevant provisions of the rule and, therefore, do not refer or apply to an Admiralty action in personam. It should also be noted that O 70 r 20(10) expressly excludes the application of O 13 of the RHC to 'actions in rem', but does not exclude its application to an action in personam.

If the plaintiff's action herein was one which could properly be brought within the Admiralty jurisdiction of the court by an action in personam, then in my judgment on the third defendant failing to enter an appearance after the writ had been served on him, it was open to the plaintiff to rely on the provisions of O 13 of the RHC to enter a judgment in default of appearance.

However, what I have just said would be of no help to the plaintiff here as its cause of action was not one that could be properly brought within the Admiralty jurisdiction of the court.

In the result I allow the third defendant's application with costs, and set aside the judgment in default of appearance entered against him.

Application allowed.

Reported by Peter Ling